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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JASON THOMAS MOORE, Defendant and Appellant.	F039996 (Super. Ct. No. 0178320) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Jeffrey D. Firestone and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Buckley, J., and Levy, J.

Appellant Jason Moore pled guilty to a misdemeanor violation of Penal Code section 148, subdivision (a)(1)[1] (obstructing a peace officer; count 3); a jury convicted him of two felonies, viz., preventing or dissuading a witness from reporting a crime (§ 136, subd. (b)(1); count 1) and false imprisonment (§ 236; count 2); and, in a separate proceeding, appellant admitted allegations that he had suffered a prior conviction that was both a serious felony conviction within the meaning of section 667, subdivision (a) and a "strike,"[2] and that he had served four separate prison terms for prior felony convictions. The court imposed a prison term of 11 years, consisting of the two-year midterm on count 1, doubled pursuant to the three strikes law (§§ 667, subd. (e)(1); 1170.12, subd. (c)(1)) for a total of 4 years; 5 years for the prior serious felony enhancement; and 1 year for each of 2 of the prior prison term enhancements. The court also imposed a concurrent four-year term on count 2.

On appeal, appellant contends (1) the evidence was insufficient to support the conviction of felony false imprisonment, and (2) the court committed prejudicial error in instructing the jury in the language of CALJIC No. 2.52 regarding the effect of evidence of flight immediately after a crime. We will modify the judgment to reflect a conviction of misdemeanor false imprisonment in count 2 and, as so modified, affirm the judgment.

FACTS

Shortly after 11:00 p.m. on August 4, 2001, City of Tulare Police Officer Richard Payne was on patrol when he saw appellant riding a bicycle on F Street.[3] Observing that the bicycle did not have a head lamp, the officer tuned on his emergency light and called

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1 All further references are to the Penal Code.

2 We use the term "strike" to describe a prior felony conviction that subjects a defendant to the increased punishment specified in the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12).

3 Except as otherwise indicated, the remainder of the factual statement is taken from Officer Payne's testimony.

out to appellant to stop. Appellant responded, "okay," and stopped his bicycle behind the officer's patrol car, but then dropped his bike and ran off.

Officer Payne called for assistance; Officer Jason Lott responded; and the two officers began a search of the area. Approximately 10 minutes after appellant had run off, Officer Payne saw appellant standing at the front door of the residence at 750 South F Street, approximately 30 to 40 yards away. The officer called out to appellant to stop, but appellant ran off again, in the direction of the north side of the residence. Both officers ran to the residence, but could not find appellant. Concluding that he had gotten away, they began a yard-to-yard search of the block.

Mandy Pena testified that she lived at 750 F Street, and was home with her three-year-old son on the night of August 4, 2001.[4] She was talking on the telephone with her mother, who warned her that "there was somebody running from the police in the area." Pena locked her front door, and then went to her back door, but, because the lock was broken, was unable to lock the door.

After checking the back door, she heard a knock at her front door. She asked who it was, and the person at the door answered, " 'Jay.' " Then, she saw two police officers "[coming] after him."

Approximately four minutes later, Pena, who was standing in the living room, heard appellant enter her house through the back door. Pena went into the kitchen. She was afraid because she "didn't know who [appellant] was." She "asked him to leave [her] house but he wouldn't leave." Appellant asked Pena several times to "let him stay." Pena "told [appellant] to leave" several times, but appellant "told [Pena] that he was gonna stay there in the house . . . ."

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[4] Except as otherwise indicated, the remainder of the factual statement is taken from Pena's testimony.

Appellant moved around in the kitchen, "back and forth[,]" and looked out the window. Pena went back into the living room and sat near her son, who was asleep on the couch. She telephoned her mother, identified herself and asked her mother to stay on the line.

Pena did not know whether appellant had a weapon. He did not "use[]" a weapon, nor did he threaten or physically abuse her son.

Approximately 10 to 15 minutes after appellant entered Pena's house, Officer Payne knocked on Pena's front door. Officer Payne testified to the following: Pena answered the door, "immediately stepped out" and told the officer, " 'He's in there.' " At that point, Officer Payne entered the house; saw appellant in the kitchen crouching behind the refrigerator; and took him into custody.

Officer Lott testified to the following: Moments after appellant was taken into custody he spoke with Pena, who told him the following: Upon entering the house, appellant stated, " 'shut up. You better not call the police.' " He then told Pena to sit down, and "[t]hat she'd better remain seated." "Every time that she went to get up from the chair he would stand directly in front of her and ordered her to sit back down."

DISCUSSION

Sufficiency of the Evidence – Felony False Imprisonment

Appellant contends, and the People concede, the evidence was insufficient to support appellant's conviction of felony false imprisonment because there was no evidence appellant effected the false imprisonment by "violence" or "menace." We agree.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate

court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) "In this context, ' "[p]ersonal liberty" ' is violated when 'the victim is "compelled to remain where he does not wish to remain, or to go where he does not wish to go." ' [Citations.] It is the restraint of a person's *freedom of movement* that is at the heart of the offense of false imprisonment embodied in section 237. [Citation.] ' " 'The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both . . . .' " ' " (*People v. Reed* (2000) 78 Cal.App.4th 274, 280.)

False imprisonment is a felony if it is "effected by violence, menace, fraud or deceit." (§ 237, subd. (a); *People v. Reed*, *supra*, (1997) 78 Cal.App.4th at p. 280.) In the absence of these factors, the offense is a misdemeanor.

" ' "Violence" . . . means the " 'the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint.' " ' [Citation.] 'Menace' is defined as ' " 'a threat of harm express or implied by word or act.' " ' " (*People v. Reed*, *supra*, (1997) 78 Cal.App.4th at p. 280.) "The reported decisions upholding convictions for felony false imprisonment involving menace generally fall into two categories. In the first category of cases there was evidence the defendant used a deadly weapon to effect the false imprisonment. . . . [¶] The second category of cases . . . presented evidence the defendant verbally threatened harm." (*People v. Matian* (1995) 35 Cal.App.4th 480, 485-486.)

In the instant case, the evidence showed the following: appellant entered Pena's home uninvited and told Pena to "shut up," remain seated and not call the police, and when Pena "went to get up from the chair" appellant "would stand directly in front of her and ordered her to sit back down." However, appellant did not touch or threaten Pena or her son, nor did he display or even suggest he had a weapon. As the parties agree, this

evidence was sufficient to support the conclusion appellant unlawfully interfered with Pena's personal liberty, and was thus guilty of false imprisonment. However, as the parties also agree, there was no evidence appellant exercised physical force or threatened Pena or her son, either expressly or impliedly, with physical harm, and therefore, the evidence was not sufficient to establish that appellant accomplished the offense through the use of "violence" or "menace" within the meaning of section 237.[5] (Cf. *People v. Matian*, *supra*, 35 Cal.App.4th at pp. 486-487 [insufficient evidence of either violence or menace where defendant, in committing offense of false imprisonment, "glar[ed] at [victim] while getting out of his chair and approaching her each time she tried to leave"].) For this reason, the evidence was not sufficient to support a conviction of felony false imprisonment.

Misdemeanor false imprisonment is a necessarily lesser included offense of felony false imprisonment. (*People v. Matian*, *supra*, 35 Cal.App.4th at p. 487.) Therefore, as the parties suggest, we will modify the verdict to indicate that appellant stands convicted of misdemeanor false imprisonment, rather than felony false imprisonment as found by the jury. (*Id*. at p. 488.)

Flight Instruction

Over defense objection, the court instructed the jury, in the language of CALJIC No. 2.52, as follows: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the other facts in deciding whether the defendant is guilty or not guilty. Whether or not evidence of flight

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5 The parties do not discuss whether the evidence was sufficient to establish appellant committed false imprisonment through the use of fraud or deceit, in all likelihood because there was no evidence of either.

shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination."

Appellant contends, and the People do not dispute, the giving of this instruction was error. We agree. " 'It is error to give an instruction which correctly states a principle of law which has no application to the facts of the case.' " (*People v. Rollo* (1977) 20 Cal.3d 109, 122-123.) Here, although there was evidence appellant fled from police *before* entering Pena's house, there was no evidence appellant fled after he committed or was accused of the two offenses for which he was on trial, viz., felony preventing or dissuading a witness from reporting a crime and felony false imprisonment. (CALJIC No. 2.52.) Therefore, the flight instruction had no applicability to the instant case.

We turn now to the question of prejudice. An instruction which, like the flight instruction here, has no application to the facts of the case "is usually harmless, having little or no effect 'other than to ad to the bulk of the charge.' " (*People v. Rollo*, *supra*, 30 Cal.3d at p. 123.) "There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant's prejudice." (*Ibid*.) When a court erroneously instructs the jury with CALJIC No. 2.52, reversal is required only if there is a reasonable probability that a result more favorable to the defendant would have been reached had the instruction not been given. (*People v. Clem* (1980) 104 Cal.App.3d 337, 344-445.)

As appellant notes, the flight instruction told jurors they could "consider" evidence of flight occurring after appellant committed or was accused of "a crime[,]" but, as indicated above, there was no evidence appellant fled after he committed or was accused of the offenses for which he was on trial. Therefore, appellant argues, the flight instruction incorrectly told the jury it could consider evidence of flight as evidence of appellant's guilt on the those offenses. And, appellant argues further, there is a substantial likelihood that the jury, in fact, relied on the flight evidence to convict, because a significant portion of the rest of the case against appellant consisted of

"inadequate," double hearsay evidence, viz., Officer Lott's testimony regarding statements made by Pena that appellant told the victim to "shut up," remain seated and not call the police.

We disagree. As appellant suggests, evidence of appellant's flight before entering Pena's house does not give rise to a reasonable inference of consciousness of guilt of the offenses committed after entering Pena's house. But although the jury was told it could "consider" evidence of flight, it was also told (1) "[w]hether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination[,]" and (2) not all instructions may be applicable and to disregard those it found inapplicable. Considering the instructions as a whole, and the lack of any logical connection between the flight evidence and the inference of consciousness of guilt on counts 1 and 2, it is not reasonably probable that the jury relied in any way on the flight evidence in determining the issue of appellant's guilt on those charges. Therefore, appellant has not established that the court's instructional error was prejudicial.

DISPOSITION

The judgment is modified to reflect a conviction of misdemeanor false imprisonment in count 2, in lieu of the conviction for felony false imprisonment. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment deleting the reference to conviction of felony false imprisonment, and forward a copy of the amended abstract to the Department of Corrections.